How Much is Your Data Worth? CCPA's Data Valuation Requirement Explored

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I. INTRODUCTION

On January 28, 2022, the Office of the Attorney General of the State of California (OAG or the California Attorney General) put businesses operating loyalty programs on notice for violations of the California Privacy Protection Act (CCPA).[1] Immediately following this press release, the

 The author thanks Lawrence Wu for his continued collaboration and thought leadership on this topic. An earlier version of this Article was co-authored with Lawrence and published in the Competition Journal of the Antitrust and Unfair Competition Law Section of the California Lawyers Association.

1. Press Release, State Cal. Dep't Just. Off. Att'y Gen., On Data Privacy Day, Attorney General Bonta Puts Businesses Operating Loyalty Programs on Notice for Violations of California Consumer Privacy Act (Jan. 28, 2022), https://oag.ca.gov/news/press-releases/

California Attorney General sent a number of Notice of Violation letters to businesses,[2] which alleged that if a business is offering "discounts, free items, or other rewards, in exchange for personal information[, it] must provide consumers with a notice of financial incentive."[3] These letters were sent to "major corporations in the retail, home improvement, travel, and food service industries."[4] The businesses were given thirty days to cure, which included not only providing notice to consumers that describe the material terms of the financial incentive program, but also included a good faith estimate of the value of the consumer data.[5] As California Attorney General Rob Bonta stated in the press release, California "is committed to the robust enforcement of the nation's toughest data privacy law"[6] and businesses will need to assess how to calculate the value of the consumer data and whether and how this value should be disclosed to the public.[7]

The CCPA went into effect on January 1, 2020, and is a first-of-its-kind law that requires businesses to calculate the value of consumer data.[8] While it includes several new consumer rights, such as the right to know,[9] right to delete,[10] and a right to opt-out,[11] this Article will focus on the right to non-discrimination and the requirement for businesses to provide a notice of financial incentive under the CCPA that includes the good faith estimate of the value of the consumer's data that forms the basis for offering the financial incentive.[12] This right of non-discrimination was amended by a citizen's ballot initiative in November 2020.[13] The California Privacy Rights Act (CPRA) amends the CCPA and reframes the non-discrimination right as the right of no retaliation and clarifies that the CCPA does not prohibit a business from offering loyalty, rewards, premium features, discounts, or club card programs as long as they are consistent with the law.[14] The CPRA also gives the new California Privacy Protection Agency

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data-privacy-day-attorney-general-bonta-puts-businesses-operating-loyalty [https://perma.cc/F5QG-CU7J].

2. *Id.*
3. *See id.*
4. *Id.*
5. *See id.*
6. *Id.*
7. *See id.*
8. *See id.*
9. CAL. CIV. CODE § 1798.110 (West 2020).
10. *Id.* § 1798.105.
11. *Id.* § 1798.120.
12. *See id.* § 1798.125.
13. *See About Us*, CAL. PRIVACY PROT. AGENCY (CPPA), https://cppa.ca.gov/about_us/ [https://perma.cc/2YU9-JV82].
14. *See* California Privacy Act of 2020 (Proposition 24), 2020 Cal. Legis. Serv. Prop. 24 § 1798.125(a)(3) (West) (effective Jan. 1, 2023).

(CPPA or the Agency) the administrative enforcement authority as well as the authority to adopt regulations.[15]

The new consumer right of non-discrimination and the notice of financial incentive requirement bring into sharp focus what obligations businesses have to disclose to the consumers how personal data is collected and used and how to assess to what extent businesses profit from that use.

II. "CONSUMER," "PERSONAL INFORMATION," AND "SALE" UNDER THE CCPA

In order for a business to understand when this non-discrimination right may be triggered and to calculate the value of the personal data, it must first understand the key terms under the CCPA which are defined broadly and may be different than what most people expect.

First, the term "[c]onsumer" under the CCPA generally means "a natural person who is a California resident."[16] Thus, CCPA requirements should only apply to California residents. However, questions may arise relating to the applicability of the law to persons who lived in California only part of the time, California residents whose information was collected before they were California residents but continues to be processed after they have moved to California, and to what extent the legal requirements would apply to data that belongs to California residents but was collected outside of California. Businesses that do not segment their data based on geographic locations or based on the time of collection may also face challenges in determining what data is in scope under the CCPA or other consumer privacy laws that are jurisdiction-specific.

Second, "[p]ersonal information" under the CCPA is defined as "information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[17] This is a very broad definition of what may constitute personal information and, therefore, be protected under the law. For instance, information such as behavioral analytics and inferences based on interaction with websites, which are used to create profiles about a consumer reflecting the consumer's preferences, may be in scope.[18] In contrast, the CCPA's definition of "personal information" does not include

15. *See* CAL. CIV. CODE § 1798.199.10(a) (2020).
16. *Id.* § 1798.140(g).
17. *Id.* § 1798.140(o)(1).
18. *Id.* § 1798.140(o)(1)(K).

information lawfully made available from federal, state, or local government records.[19] Based on the CPRA amendments, starting on January 1, 2023, businesses can also exclude from the CCPA's scope "publicly available" information, which is defined as the following:

> Information that a business has a reasonable basis to believe is lawfully made available to the general public by the consumer or from widely distributed media, or by the consumer; or information made available by a person to whom the consumer has disclosed the information if the consumer has not restricted the information to a specific audience.[20]

Since this is a new definition of what it means for a business to collect and use "publicly available" information, the new agency will interpret this scope limitation when the amended CCPA becomes enforceable on July 1, 2023.[21]

Third, the terms "sell," "selling," "sale," or "sold," are defined as "selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to another business or a third party for monetary or other valuable consideration."[22] Because of this broad definition, even transfers that do not involve a financial payment could constitute a sale under the CCPA.[23] Most companies do not sell their data for money, but they may engage in bulk data sharing for product improvement, inventory control or other purposes to enhance the product or service they provide to consumers. In order for data transfers to not be considered as a "sale," businesses can rely on the "business purpose" exception.[24] Specifically, a business can use the

> personal information for the business's or a service provider's operational purposes, or other notified purposes, provided that the use of personal information shall be *reasonably necessary* and *proportionate* to achieve the purpose for which the personal information was collected or processed or for another operational purpose that is *compatible with the context* in which the personal information was collected.[25]

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19. *Id.* § 1798.140(o)(2).
20. California Privacy Act of 2020 (Proposition 24), 2020 Cal. Legis. Serv. Prop. 24 § 1798.140(v)(2) (West) (effective Jan. 1, 2023).
21. *Id.*
22. CAL. CIV. CODE § 1798.140(t)(1) (2020).
23. *See id.*
24. *Id.* § 1798.140(d).
25. *Id.* (emphasis added).

III. THE RIGHT OF NON-DISCRIMINATION UNDER THE CCPA

Given the definitions of "consumer," "personal information," and "sale" under the CCPA and the complexities surrounding those key terms that are likely to depend on situation-specific facts, many "use case" scenarios involving the transfer of data from one party to another may constitute a sale, and thus be subject to the consumer's right to opt-out from such sale of personal information.[26] Because in a data economy, the volume, accuracy, and integrity of a data set are important drivers for calculating the value of a certain data set, businesses may be motivated to discourage any consumer actions that would result in the data not being as complete as it can be.

One of the most groundbreaking aspects of the CCPA is the notion that consumers have a right to non-discrimination—or right of no retaliation, as reframed by the CPRA—under which businesses are prohibited from discriminating against consumers who exercise their privacy rights, such as the right to know, delete, or opt-out of the sale of their personal information.[27] To comply with the CCPA, businesses must include a statement in their privacy policies informing consumers that they have a right "not to receive discriminatory treatment" for exercising their CCPA rights.[28]

While the CCPA does not define what it means to "discriminate," it provides a non-exclusive list of practices that may qualify as discriminatory.[29] Businesses must not respond to a consumer who exercised the consumer's rights under the CCPA by:

- Denying goods or services;
- Charging different prices;
- Providing a different quality of goods or services; and
- Suggesting that the consumer may receive a different price or rate.[30]

Thus, under the CCPA, and as highlighted in the loyalty program investigative sweep notice in January 2022, businesses should assess how consumer

26. *Id.* §§ 1798.120, 1798.140 (g)–(t).
27. *Id.* § 1798.125; California Privacy Act of 2020 (Proposition 24), 2020 Cal. Legis. Serv. Prop. 24 § 1798.125 (West) (effective Jan. 1, 2023).
28. CAL. CODE REGS. tit. 11, § 7011(c)(4)(a) (2022) (formerly numbered as § 999.308(c)(4)(a)).
29. CAL. CIV. CODE § 1798.125(a)(1)(A)–(D).
30. *Id.*

rights exercised by consumers who opt into their loyalty or discount programs are handled to make sure the practice is not discriminatory. As illustrated in the examples provided in the regulations, a clothing business can deny a consumer's request to delete their email address and the amount the consumer has spent with the business because that information is necessary for the business to provide the loyalty program requested by the consumer.[31] This is if the loyalty program is tied to coupons received by email.[32] However, if the coupons are delivered through browser pop-up windows by an online bookseller, it cannot deny the consumer's request to delete the email address because the email address is not necessary to provide the coupons or reasonably aligned with the expectations of the consumer based on the consumer's relationship with the business.[33] Although this is not stated in the example explicitly, this example appears to assume that the consumer primarily interacts with the bookseller online and the email address is not needed for any other purpose.

In order to understand what types of business practices trigger a "discrimination" assessment under the CCPA, a business first needs to review what data may be in scope for a consumer who is exercising their rights. Based on the broad definition of personal information, as discussed above, the scope of the consumer rights may be broad. In addition to a general CCPA consumer rights program, a specific four-part test is needed to specifically analyze how the consumer rights apply to loyalty programs. A business should (1) review what personal information is collected by such loyalty or discount programs that may not be collected from other consumers who have not opted into those programs (e.g., transaction history, games played, points redeemed); (2) determine how consumers opt into those programs, which could include a review of the sign-up pages and an inquiry into whether monetary payment is involved or not for consumers to sign up; (3) assess what information is necessary for the purpose of administrating those programs; and (4) identify any information that could be deemed to be outside of the expectations of the consumer. If any information that is collected as part of the loyalty programs or discount programs is outside of the stated purpose of administrating those programs as requested by the consumer, that information may be subject to deletion and opt-out rights under the CCPA.[34] If the business denies consumers' requests to exercise their rights, that practice may be deemed discriminatory.[35] While this Article does not cover the exceptions that may apply to the deletion and

31. CAL. CODE REGS. tit. 11, § 7080(d)(2) (2022) (formerly numbered as § 999.336(d)(2)).
32. *See id.*
33. *See id.* § 7080(d)(4) (formerly numbered as § 999.336(d)(4)).
34. *See* CAL. CIV. CODE §§ 1798.105, 1798.120(a).
35. *See id.* § 1798.125(a).

opt-out rights, we discuss next the financial incentive program which would allow a price or service difference to be non-discriminatory.

IV. NOTICE OF FINANCIAL INCENTIVE UNDER THE CCPA

The CCPA provides certain exceptions to the general prohibition on discrimination.[36] A notice of financial incentive must be provided to consumers before they opt-in to any "financial incentive" program, benefit, or other offering that is related to the collection, retention, or sale of personal information.[37] The financial incentive notice must include all information a consumer would want to know before consenting to participate in such a program, specifically:

1. A succinct summary of the financial incentive or price or service difference offered;
2. A description of the material terms of the financial incentive or price or service difference, including the categories of personal information that are implicated by the financial incentive or price or service difference *and the value of the consumer's data*;
3. How the consumer can opt-in to the financial incentive or price or service difference;
4. A statement of the consumer's right to withdraw from the financial incentive at any time and how the consumer may exercise that right; and
5. An explanation of how the financial incentive or price or service difference is reasonably related to the value of the consumer's data, including:
   A. A good-faith estimate of the value of the consumer's data that forms the basis for offering the financial incentive or price or service difference; and
   B. A description of the method the business used to calculate the value of the consumer's data.[38]

We can view the requirement as having three components. First, the company needs to explain the material terms of the financial incentive or

36. *Id.* § 1798.125(a)(2).
37. *Id.* § 1798.125(b)(3).
38. CAL. CODE REGS. tit. 11, § 7016(b) (2022) (emphasis added) (formerly numbered as § 999.307(b)).

price or service difference.[39] Second, the company needs to provide a good faith estimate of the value of the consumer's data, which includes a description of the methodology used to calculate the estimate.[40] Third, the company has to provide those two things together to explain how that financial incentive or price/service difference is related to the value of the consumer's data.[41] Thus, the requirement is more than coming up with a good faith estimate of the value of the consumer's data.

It is important to note that the phrase "and the value of the consumer's data" was added in the Final Regulations section 999.307(b)(2) by the OAG,[42] to clarify, according to its Final Statement of Reasons, that "the value of the consumer's data is always a material term of such a financial incentive program."[43] The OAG adds:

> This change is necessary because some public comments appear to mistakenly believe that businesses may operate financial incentive programs without performing a valuation of consumer data. . . . The addition of the words "and the value of the consumer's data" benefits consumers and businesses by providing clarity and certainty that such value is always among the "material terms" of any financial incentive or price or service difference, as those terms are defined in these regulations.[44]

"This has generally been interpreted to mean that the CCPA was intended to allow businesses to offer tiered pricing or service levels so long as the financial incentive or price or service difference is reasonably related to the value of the consumer's data."[45] However, a business relying on this exception must show that the tiered pricing or service levels are reasonably related to the value of the consumer's data and calculate a good-faith estimate of the value of the consumer's data.[46] For example, this means companies need to publish as part of their Notice of Financial Incentive within the online privacy policy a good faith estimate of the value of the data that is the basis for the financial incentive to incentivize consumers to not exercise their right to opt-out from the sale of their personal

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39. *Id.* § 7016(b)(1)–(2) (formerly numbered as § 999.307(b)(1)–(2)).
40. *Id.* § 7016(b)(5)(A)–(B) (formerly numbered as § 999.307(b)(5)(a)–(b)).
41. *See id.* § 7016(b)(5) (formerly numbered as § 999.307(b)(5)).
42. *Id.* § 7016(b)(2) (formerly numbered as § 999.307(b)(2)).
43. OFF. ATT'Y GEN., STATE CAL. DEP'T JUST., FINAL STATEMENT OF REASONS 17, https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-fsor.pdf [https://perma.cc/RM5F-EZ8L].
44. *Id.*
45. Jeewon Kim Serrato & Lawrence Wu, *Privacy, Pricing, and the Value of Consumer Data: The Complex Nature of the CCPA's Non-Discrimination Requirement*, 30 COMPETITION, Fall 2020, at 100, 102.
46. *Id.*

information.[47] This Notice will also need to include the methodology the business is using to calculate that value.[48]

V. ESTIMATING THE VALUE OF CONSUMER DATA

The regulations offer a number of considerations that a company may use to calculate the value of consumer data to the company. These factors include:

- The marginal, average, or aggregate value to the business of the data collected, sold, or deleted;
- The revenue generated by the business from the sale, collection, or retention of consumers' personal information;
- The expenses that the business may incur in connection with the sale, collection, or retention of the data or with the offer or provision of any financial incentive or price or service difference; and
- The profit generated by the business from the sale, collection, or retention of consumers' personal information.[49]

Although these factors may appear straightforward, the ultimate methodology the business chooses to use may be nuanced given multiple considerations at play. As discussed in more detail below, the OAG appears to interpret this data valuation requirement in terms of the profit that may be generated from the sale, collection or retention of consumer personal information.[50] Many companies initially took the position that if they are not receiving monetary compensation for selling data and the business is not compensating the consumer in exchange for their personal information, a notice of financial incentive is not needed. Companies set and adjust the prices of their various products all the time. Changes in price or service may be the result of market conditions or the cost of goods and may be wholly unrelated to the value of the consumer data.

The next Part looks at how the discrimination analysis and the notice of financial incentive requirements are interpreted by the regulators.

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47. *Id.*
48. *Id.*
49. Serrato & Wu, *supra* note 45, at 108; *see also* CAL. CODE REGS. tit 11, § 7081(a) (2022) (formerly numbered as § 999.337(a)).
50. *See* OFF. ATT'Y GEN., STATE CAL. DEP'T JUST., *supra* note 43.

CCPA's requirement for a discrimination analysis coupled with the requirement to provide a notice of financial incentive is the first of its kind.[51] We cannot underestimate the lasting impact this new consumer right will have on the global privacy discourse and how regulators view the respective rights and powers the consumers and businesses have in controlling the use of personal data that is collected about individuals.[52]

Starting on July 1, 2020, the OAG began enforcing the CCPA and interpreting this provision.[53] According to the Frequently Asked Questions that were published by the OAG, "[b]usinesses cannot deny goods or services, charge you a different price, or provide a different level or quality of goods or services just because you exercised your rights under the CCPA."[54] This does not mean, however, that consumers have an unlimited right to non-discrimination without consequences.[55] The OAG provides two examples of potential consequences:

> [First,] if you refuse to provide your personal information to a business or ask it to delete or stop selling your personal information, and that personal information or sale is necessary for the business to provide you with goods or services, the business may not be able to complete that transaction. . . . [Or second,] [i]f you ask a business to delete or stop selling your personal information, you may not be able to continue participating in the special deals they offer in exchange for personal information.[56]

Not being able to complete the requested transaction or not allowing customers to participate in special deals, however, are often not the desired outcome for businesses, so businesses must design the financial incentive program to be compliant with the CCPA and provide the required notice to offer promotions, discounts and other deals in exchange for collecting, keeping or selling your personal information.[57]

The OAG published a number of CCPA enforcement case examples on July 19, 2021, which included one case involving the notice of financial

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51. *See supra* notes 6–8 and accompanying text.

52. *See* Press Release, State Cal. Dep't Just. Off. Att'y Gen., Attorney General Bonta Announces Settlement with Sephora as Part of Ongoing Enforcement of California Consumer Privacy Act (Aug. 24, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-settlement-sephora-part-ongoing-enforcement [https://perma.cc/6MYK-5RDJ].

53. *See* Press Release, State Cal. Dep't Just. Off. Att'y Gen., *supra* note 1.

54. *California Consumer Privacy Act (CCPA)*, STATE CAL. DEP'T OF JUST., OFF. ATT'Y GEN., https://oag.ca.gov/privacy/ccpa#sectionf [https://perma.cc/JG5E-8VLR].

55. *See id.*

56. *Id.*

57. *See id.*

incentive issue.[58] While announcing a first-year CCPA enforcement update as part of a press release, the OAG described an enforcement action against a business that operates a chain of grocery stores. The fact pattern at issue included the company loyalty programs and the fact that the business required consumers to provide personal information in exchange for participation in its company loyalty programs.[59] The OAG stated a Notice of Financial Incentive was required to be provided to consumers participating in these loyalty programs and that the company amended its privacy policy to include a Notice of Financial Incentive after being notified of this alleged noncompliance.[60] This is the only enforcement case example we have available to date.[61] All other investigations relating to noncompliance have been confidential.[62]

While the OAG has not published much guidance in terms of enforcement examples to shed light on how the loyalty programs must evaluate the retaliation issue and provide a Notice of Financial Incentive,[63] the Agency provided further guidance on the relations between the two requirements as part of its proposed rulemaking.[64] On July 8, 2022, the Agency published the Notice of Proposed Rulemaking which includes a set of draft regulations for the CCPA, as amended by the CPRA.[65] The Agency also published the Initial Statement of Reasons, which provides the specific purpose and reasoning for each section.[66] For section 7080, Discriminatory Practices, the Agency explains that subsection (a) and (b) have been revised to clarify how Civil Code section 1798.125 applies to discriminatory practices.[67] According to the Agency,

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58. *CCPA Enforcement Case Examples*, STATE CAL. DEP'T JUST. (Aug. 24, 2022), https://oag.ca.gov/privacy/ccpa/enforcement [https://perma.cc/S852-C5WP].
59. *Id.*
60. *Id.*
61. *See id.*
62. *See id.*
63. *See* CAL. CODE REGS. tit. 11, § 7016 (2022) (formerly numbered as § 999.307).
64. CAL. PRIV. PROT. AGENCY, MODIFIED TEXT OF PROPOSED REGULATION § 7016 (2022), https://cppa.ca.gov/regulations/pdf/20221102_mod_text.pdf [https://perma.cc/BR5H-BFVL].
65. *See California Consumer Privacy Act Regulations*, CAL. PRIV. PROT. AGENCY, https://cppa.ca.gov/regulations/consumer_privacy_act.html [https://perma.cc/2B2Z-5URT].
66. CAL. PRIV. PROT. AGENCY, INITIAL STATEMENT OF REASONS (2022), https://cppa.ca.gov/regulations/pdf/20220708_isr.pdf [https://perma.cc/7JMP-XX3L].
67. *Id.* at 57.

> Civil Code section 1798.125, subdivision (a), does not include financial incentives when addressing discrimination. Financial incentives where some type of benefit is given directly for the collection, sale/sharing, or retention of personal information do not invoke a discrimination analysis because there is a separate negotiation taking place for the specific incentive.[68]

This is notable because this means the Agency could consider Civil Code section 1798.125, subdivision (b) as an independent requirement, separate and apart from the discrimination analysis under Civil Code section 1798.125, subdivision (a).[69] Reading Civil Code section 1798.125 subdivisions (a) and (b) together, businesses could read that if the business does not discriminate against consumers for exercising their rights, the financial incentive requirement is not triggered.[70] Instead, the Agency may be saying that if a financial incentive is being offered, a business should provide a notice of financial incentive, whether or not discrimination occurs.[71] In the draft regulations published in the November 2022 Modified Text of Proposed Regulations, the Agency appears to further clarify this by adding to the definition of financial incentive that "[p]rice or service differences are types of financial incentives."[72]

Removing the discrimination analysis and reading Civil Code section 1798.125 subdivision (b) alone, the financial incentive requirement becomes very broad. Civil Code section 1798.125 subdivision (b)(1) reads:

> A business may offer financial incentives, including payments to consumers as compensation, for the collection of personal information, the sale or sharing of personal information, or the retention of personal information. A business may also offer a different price, rate, level, or quality of goods or services to the consumer if that price or difference is reasonably related to the value provided to the business by the consumer's data.[73]

Without the discrimination analysis, this could mean that a business must analyze whether a notice of financial incentive needs to be provided each time it collects, sells, shares or retains personal information *and* any difference in price, rate, level, or quality of goods or services to the consumer must be reasonably related to the value provided to the business by the consumer's data.[74] To operationalize this reading of the statute, a notice of financial incentive must be provided before a consumer opts into any loyalty program or a discount program, in addition to a notice at collection

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68. *Id.*
69. *See id.*
70. *See* CAL. CIV. CODE § 1798.125.
71. *See id.* § 1798.125(b).
72. CAL. PRIV. PROT. AGENCY, *supra* note 64, § 7001(*l*).
73. California Privacy Act of 2020 (Proposition 24), 2020 Cal. Legis. Serv. Prop. 24 § 1798.125(b)(1) (West) (effective Jan. 1, 2023).
74. *See id.*

or a privacy policy and that financial incentive notice needs to show that the price or service difference is related to the value provided to the business by the consumer's data.[75]

This interpretation of the statute may receive challenges from the industry. Because Civil Code section 1798.125 subdivisions (a) and (b) appear under the section for the non-discrimination right, many businesses understood the notice of financial incentive requirement to be triggered only if there was discrimination. In the Statement of Reasons, the Agency seems to address this by stating: "This change is necessary to align t[he] regulation to the language of the statute, as well as to clear up confusion in the marketplace caused by the existing regulation."[76]

The OAG press release announcing the investigative sweep of loyalty programs also appears to support this view.[77] When OAG announced the enforcement focus on the financial incentive program on January 28, 2022, there was no mention of discriminatory practices.[78] The OAG's enforcement actions appear to center around loyalty programs that offer financial incentives, such as discounts, free items, or other rewards, in exchange for personal information.[79] There is no allegation that any of these businesses offering loyalty and discount programs failed to allow California consumers to exercise their rights under the CCPA, such as the right to delete or opt-out.[80]

Instead of analyzing whether the business engages in discriminatory practices, as defined under the CCPA, the OAG appears to be motivated by the question of profit.[81] In the press release announcing the investigative sweep of loyalty programs, the OAG discusses the example of brick and mortar stores such as supermarkets and coffee shops that are giving discounts and reward points, and the OAG states that they are "collecting our data—and they're finding new ways to profit from it."[82]

The word "profit" does not appear anywhere in the CCPA except to define the term "business"—the CCPA only applies to for-profit entities.[83] The only place the word appears is in the regulations, where the profit

75. *Id.*
76. *See* CAL. PRIV. PROT. AGENCY, *supra* note 66, at 57.
77. *See* Press Release, State Cal. Dep't Just. Off. Att'y Gen., *supra* note 1.
78. *See id.*
79. *Id.*
80. *See id.*
81. *See id.*
82. *Id.*
83. *See* CAL. CIV. CODE § 1798.140(c)(1).

generated by the business from the sale, collection, or retention of consumer's personal information is listed as one of the methods by which the business may calculate the value of the consumer's data.[84] Although most businesses understood the notice of financial incentive requirement to be tied to the non-discrimination right, the OAG and the Agency appear to assume that loyalty programs profit from the use of consumer data and interpret the notice requirement to be triggered by the desire to inform the consumers of the estimated value of their data so that they can make an informed decision whether to opt into the loyalty program.[85] By doing so, the regulators may view all price or service difference as a financial incentive and, thus, require all loyalty programs to be considered as financial incentive programs whether or not discrimination occurs and even if the company does not profit from selling consumer data.[86] The scope of this financial incentive program requirement becomes even broader when we consider the broad definition of what it means to "sell" under the CCPA, thus bringing into question yet again what it means for businesses to profit from consumer data.[87]

VII. CONCLUSION

The CCPA is new and compliance with the regulation raises complex legal and economic issues. This is particularly true with respect to the non-discrimination and the notice of financial incentive requirements in the law. Because recent OAG enforcement actions and Agency interpretations seem to require businesses to analyze the financial incentive notice requirement, even if no discrimination occurs, businesses may need to review any instances where a consumer opts into a program or an offer that results in a price or service difference, and assess whether such price or service difference is a financial incentive. If so, a notice of financial incentive should: (a) explain the terms of the financial incentive or price or service difference; (b) calculate the value of the consumer's data; and (c) explain how the two are reasonably related. On the surface, this may seem straightforward, but in practice, the terms of the financial incentive may not be easy to explain, particularly if there are unknowns that relate to what data the business is collecting and what it is worth.

Value and price are complex economic concepts, and they are central to the compliance process that cannot be conducted in silos. Although this

84. *See* CAL. CODE REGS. tit. 11, § 7081(a)(7) (2022) (formerly numbered as § 999.337(a)(7)).
85. *See* Press Release State Cal. Dep't Just. Off. Att'y Gen., *supra* note 1.
86. *See id.*
87. *See* CAL. CIV. CODE § 1798.140(t)(1).

is a privacy law issue, companies should consult whether a public disclosure of the value of consumer data has antitrust implications.[88] These pricing and valuation-related data issues will increasingly be the focus of regulatory enforcement as the acquisition of data, sharing of data, and the merging of data blur the lines between privacy and antitrust objectives.[89] For public companies, an evaluation may also be needed to consider if a disclosure of the good faith estimate of the value of the consumer data could be considered a public disclosure of material nonpublic information.[90]

California Attorney General Rob Bonta stated in his press release while announcing the CCPA investigative sweep that he "urge[s] all businesses in California to take note and be transparent about how you're using your customer's data."[91] By requiring businesses to provide notice and obtain opt-in consent if they wish to offer a different price, rate, level, or quality of goods or services to the consumer based on the collection and use of personal information,[92] the CCPA, in essence, becomes a first-of-its-kind law that requires businesses to calculate and disclose the value of the consumer's data. This step of calculating the value of the consumer's data is an important one, but it will be a complex undertaking due to the interrelationships that touch on consumers' right to privacy and non-discrimination under the CCPA, the need for businesses to compete and to be able to price and market their products in response to market conditions, and the revenues that a company may be able to earn by collecting, selling, and retaining consumer data. The first step to interrogating the value of consumer data may need to begin with the businesses understanding what data they collect, retain, or sell.

88. *See* Alyse F. Stach, Ann M. O'Brien & Jeewon Kim Serrato, *The Thin Line Between Privacy and Antitrust*, IAPP: THE PRIV. ADVISOR (June 23, 2020), https://iapp.org/news/a/the-thin-line-between-privacy-and-antitrust/ [https://perma.cc/2RUB-UTEU].
89. *Id.*
90. *See id.*
91. Press Release, State Cal. Dep't Just. Off. Att'y Gen., *supra* note 1.
92. *See id.*

VIII. ADDENDUM

As this Article went to print, the California Privacy Protection Agency was in the middle of finalizing its rulemaking for the California Consumer Privacy Act, as amended by the California Privacy Rights Act. The manuscript and footnote citations make clear to which version of the regulations or the statute the author is referring, given the fast-evolving nature of the rulemaking process currently underway in California on this topic.